STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2005
v	No. 254880 Genesee Circuit Court
ANTONIO RICHARDSON, Defendant-Appellant.	LC No. 02-01073-FC

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant, Antonio Richardson, appeals by leave granted from the trial court's denial of his motion for resentencing stemming from his plea-based conviction of Armed Robbery, MCL 750.529 as a third habitual offender, MCL 769.11. Defendant was sentenced to 126 to 220 months imprisonment. Affirmed.

I. FACTS

On August 31, 2002, defendant and an accomplice entered a Seven-Eleven convenience store. Defendant had a knife concealed in the sleeve of his jacket. Defendant approached a cashier and showed her that he had a knife. He ordered her to open her cash register and step back so that he could remove the money. Defendant removed $166.23 from the register, while his accomplice took cigarettes and lottery tickets. Both men then fled in a dark tan van.

II. SENTENCING ISSUES

A. Standard of Review

Defendant failed to object to his sentence at his sentencing hearing. He raised all of the issues on appeal in a motion for resentencing. Generally, when reviewing a trial court's imposition of a sentence, this Court reviews for an abuse of discretion, but if the defendant fails to preserve the issue through objection at sentencing, as is the case here, this Court's review is limited to whether there was plain error which affected substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). We review de novo the application of the statutory sentencing guidelines. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003).

B. PRV 1

Defendant argues that his 1988 conviction for breaking and entering an occupied dwelling should not have been considered a high severity felony under prior record variable (PRV)1. We disagree.

In 1988, defendant was convicted of breaking and entering an occupied dwelling, MCL 750.110 and sentenced to 3 to 5 years in prison.[1] Defendant entered a home and stole a television and VCR.[2] In 1994, the Michigan Legislature revised MCL 750.110 and the crime of breaking and entering an occupied dwelling became either first, second or third degree home invasion under MCL 750.110a.

Defendant argues that under the present statute the crime for which he was convicted would be considered third-degree home invasion, which is a class E low-severity felony not subject to scoring under PRV 1.[3] Plaintiff, on the other hand, argues that under the present statute, defendant committed the crime of second-degree home invasion, which is a class C high severity felony and was properly scored as such under PRV 1 by the trial court.

MCL 750.110a(3) defines second-degree home invasion as:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny[4], or assault in the dwelling, or

---

[1] Defendant's presentence investigation report (PSIR) states that he was sentenced to 3-15 years for this offence, however, the copy of his judgment of sentence attached to defendant's brief shows a sentence of 3-5 years.

[2] Defendant was originally charged with two counts of breaking and entering; one for stealing the TV and one for stealing the VCR. Defendant was ultimately convicted of one count and the other count was dropped. It is unclear from the record whether his conviction was for taking the TV or the VCR.

[3] Only crimes listed in offense classes M2, A, B, C, or D may be scored as prior high severity felony convictions. MCL 777.51.

[4] Michigan's larceny statute MCL 750.356 provides in relevant part:

> (1) A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> * * *
>
> (3) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00 or 3 times the value of the property stolen, whichever is greater, or both imprisonment and a fine:

(continued…)

> a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

MCL 750.110a(4) defines third-degree home invasion in relevant part as:

> A person is guilty of home invasion in the third degree if the person does either of the following:
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Defendant argues that stealing a TV or VCR amounts to a misdemeanor because the value of the TV or the VCR was less than $1,000.00. Plaintiff argues that this crime was second-degree home invasion based on the unpublished decision of *People v Ayers* (Docket no 236875 rel'd March 20, 2003. In *Ayers*, this Court determined that the defendant, who had committed "breaking and entering with intent" in 1986, was properly scored 25 points for PRV 1. However, *Ayers* contains no information about the nature of the 1986 breaking and entering offense.

Here, during the hearing on the motion for resentencing, the trial court reasoned that scoring this crime as a high severity felony was proper because defendant could have been charged with "larceny in a building" which would have been a felony level conviction. The trial

---

(…continued)

> (a) The property stolen has a value of $1,000.00 or more but less than $20,000.00.
>
> * * *
>
> (4) If any of the following apply, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00 or 3 times the value of the property stolen, whichever is greater, or both imprisonment and a fine:
>
> (a) The property stolen has a value of $200.00 or more but less than $1,000.00.
>
> * * *
>
> (5) If the property stolen has a value of less than $200.00, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00 or 3 times the value of the property stolen, whichever is greater, or both imprisonment and a fine.

court's rationale is unsupported by the language of PRV 1, which requires that a person actually be convicted of the crime scored under this variable.

In order to determine whether defendant committed second-degree home invasion or third-degree home invasion in 1988, this Court must interpret MCL 750.110a(3) in conjunction with MCL 750.110a(4). MCL 750.110a(3) states that person is guilty of second-degree home invasion when the person breaks and enters a dwelling with intent to commit a felony, larceny or assault. On the other hand, MCL 750.110a(4) states that a person is guilty of third-degree home invasion when the person breaks and enters a dwelling with intent to commit a misdemeanor. The larceny statute, MCL 750.356 states that a person can commit either a felony larceny or a misdemeanor larceny. Thus, this Court must determine whether the term "larceny" in MCL 750.110a(3) includes both felony and misdemeanor larceny, or whether a misdemeanor larceny is only covered by MCL 750.110a(4).

Apparently plain statutory language can be rendered ambiguous by its interaction with other statutes. *People v Valentin*, 457 Mich 1, 6; 577 NW2d 73 (1998). If reasonable minds can differ as to the meaning of a statute, judicial construction is appropriate. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000). When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994); *People v Hendrick*, 261 Mich App 673, 679; 683 NW2d 218 (2004). Here, the definition of second-degree home invasion specifically includes larceny, in addition to felony and assault. In construing a statute, this Court should presume that every word has some meaning and should avoid any construction which would render any part of a statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). Thus, we find the term "larceny" within the second-degree home invasion statute MCL 750.110a(3), includes both felony and misdemeanor larceny. To find otherwise would render the term "larceny" superfluous as felony larceny is covered by the term "felony.[5]"

Therefore, we find that the crime defendant committed in 1988 was properly considered second-degree home invasion under MCL 750.110a(3) for purposes of scoring PRV 1. Defendant committed a breaking and entering with the intent to commit a larceny by taking a TV and VCR. The trial court did not err in scoring defendant 25 points under PRV 1 for a prior high severity felony.

C. Scoring 4 Prior Felony Convictions Under PRV 1 and 2

Defendant argues that the trial court erred in scoring all four of defendant's prior convictions under PRV 1 and 2 because the plea bargain stated that the prosecution would drop the habitual charge from fourth habitual offender to third habitual offender. We disagree.

Here, defendant's plea agreement stated that the prosecution would amend defendant's charges from fourth habitual offender to third habitual offender. This agreement is related to

[5] The inclusion of "assault" in this statute further bolsters this interpretation as there are both felony and misdemeanor crimes of assault.

defendant's charges under the habitual offender statutes, MCL 769.10, 769.11 and 769.12. However, this agreement does not pertain to the scoring of prior record variables 1 and 2. We find that the manner in which prior record variables are scored is separate from whether a felon is sentenced as a habitual offender.

D. OV 1

Defendant argues that the trial court erred in scoring defendant 15 points for offense variable (OV) 1 because the victim's testimony indicated that defendant did not threaten the victim with a knife and that the victim did not have a reasonable apprehension of an immediate battery. We disagree.

OV 1 provides that 15 points may be assessed where "a firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31. The victim testified about the incident at a preliminary examination, she stated: "And like I told everybody, he never threatened me;" "But the man never threatened me one time;" "He never, never threatened or pointed it [the knife] at me." Defendant argues that these statements directly contradict scoring 15 points for OV 1 because the victim specifically stated that she was never threatened. Plaintiff notes that during his plea, defendant stated that he believed that the victim was threatened or intimidated by the knife and that her fear motivated her to open the cash register.

Although the victim claimed that defendant did not "threaten" her with a knife, her actions indicate that she had an apprehension of immediate battery when she observed defendant carrying the knife. The victim stated that she saw a knife in defendant's hand and defendant told her two or three times to open the cash register. The victim opened the cash register and stood back so defendant could take the money. The victim said that she opened the register because defendant's "eyes were funny," which she stated meant "glassy." The trial court reasonably inferred from this testimony that the victim complied with defendant's order to open the cash register because she felt an apprehension of immediate battery. A scoring decision will not be reversed if any evidence exists to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

E. OV 4

Defendant argues that the trial court erred in scoring defendant 10 points for OV 4 because there was no evidence that the victim suffered serious psychological injury. We disagree.

Defendant received 10 points for OV 4. A defendant is to receive 10 points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The victim's failure to seek treatment is not conclusive whether the injury required treatment. MCL 777.34(2). In denying defendant's motion for resentencing, the trial court noted that the victim impact statement indicated that the victim is "always looking behind herself" and "will never forget the look on defendant's face when he took the cash." Further, the court noted that the victim stated that she was afraid defendant's friends would return to the store and that the victim started taking Valium as a result of defendant's actions. It is not clear whether the original sentencing court relied on this victim impact statement in imposing its sentence.

The victim impact statement to which the trial court referred is not included as a part of the record in this case. The PSIR under the heading "Victim Impact Statement" states,

> Lorraine Marshall, the victim in this matter was contacted. She indicated a desire that the defendant be put away form [sic] awhile. Since the incident she has submitted a Victim Impact Statement for the Court's review. Ms. Marshall will not be in Court for the sentencing as she does not want to see defendant again. She only asks that she is notified when he is released.

In defendant's brief, appellate counsel notes that upon taking over the case, he was unable to locate the victim impact statement upon which the trial court relied. It was not included in the lower court record and when he asked the clerk of the lower court, he was told that the victim impact statements are not a part of the record, but were kept at the Genesee County Probation Department. Defense counsel states that he called the probation department and was told that in this case, the victim impact statement had been destroyed long ago.

Defendant's arguments and the trial court's determination that the victim suffered serious psychological injury requiring professional treatment are based upon interpretation of this missing statement. In *People v McAllister*, 241 Mich App 466, 476-477, 616 NW2d 203 (2000) this Court noted:

> [O]ur Legislature has determined the contents of the PSIR and has given victims the discretion to determine whether their victim impact statements may be included in the PSIR at the request of the victim. MCL 771.14(2)(b), MCL § 780.764. Any requirement to the contrary should be mandated by the Legislature.

Thus, there is no requirement that the victim impact statement be included in the PSIR or in the record absent a request by the victim. This Court must rely on the existing record in analyzing this issue. The trial court relied on several statements made by the victim indicating that the event upset her and she continues to think about the event. The trial court noted that the victim "can't say in words how something like this leaves you feeling, and she tries not to dwell on it or talk about it." The victim also mentioned that she takes valium as a result of this incident. Therefore, the trial court found evidence that the victim suffered serious psychological injury and did not err in scoring 10 points for OV 4.

F. OV 14

Finally, defendant argues that the trial court erred in scoring defendant 10 point for OV 14 where there was no evidence that defendant was a leader in a multiple offender situation. We disagree.

Offense Variable 14 concerns the offender's role in the crime and permits an award of ten points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). We note that MCL § 777.44(2)(b) provides that more than one individual may be labeled a leader when three or more people are involved. Here, defendant was the one who took the lead in accosting the clerk convincing her to open the cash register so he could take the money. It was only after defendant displayed his knife and threatened the clerk that defendant's accomplice began to take lottery tickets and cigarettes. The accomplice did not interact with the clerk, nor

did he have a weapon. Thus, the trial court did not err in finding that defendant took a leadership role in this crime.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette